IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 1980

JOHN R. SITTON

VS

THE STATE OF TEXAS

NO. 80-5904

STATEMENT OF JURISDICTION

AND/OR

PETITION FOR WRIT OF CERTIORARI

OR

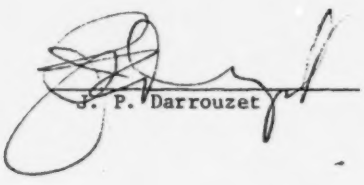
ATTORNEY FOR APPELLANT-PETITIONER

J. P. Darrouzet
Counsellor at Law
Suite No. G-10
812 San Antonio
Austin TX 78701

512 477 4210

Member of the Bar of the
United States Supreme Court

The "record" in this case is so short and the citations are so few in number that and index, list of authoirities and appendix isn't felt to be necessary; accordingly leave is respectfully prayed to omit the same.



J. P. Darrouzet

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

JOHN R. SITTON,
PETITIONER

VS

NO. _____

THE STATE OF TEXAS,
RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

(28 USC §1915: Supreme Court
[herein SC] Rule 53)

TO THE HONORABLE COURT:

This case arose in the Municipal Court of Austin, Travis County, Texas. On February 21st, 1980, JOHN R. SITTON, Appellant herein (Defendant below) was given a ticket, Art. 6701d, Sec. 148 TCS, for Speeding, Art 6701d, Sec. 166 TCS. He was convicted by said Municipal Court and appealed the case to the County Court at Law No. One of Travis County, Texas, which transferred the case to County Court at Law No. Two of Travis County, Texas.

After SITTON'S MOTION TO QUASH was overruled, he was, on July 17th, 1980, tried by a jury and found guilty and punished by a fine of $25.00. On August 14th, 1980, the Court imposed the sentence and entered judgment against SITTON for the assessed fine.

The "record" of this "sentence", Art. 42.02 TCCrP and "judgment", Art. 42.01 TCCrP, are with the Hon. Doris Shropshire, County Clerk for Travis County, Texas, with offices in the County Courthouse in Austin, Travis County, Texas 78701 (512: 477-6188); and nowhere else, since this finalizes the case under the Texas Constitution, the Texas Statutory Law, the Texas Case Law, all as heretofore recognized by this Court.

Art. V, Sec. 5, Texas Constitution; Art. 4.03 TCCrP; WILLIAMS 339 SW(2) 63 (1960); ABRAMS 563 SW(2) 610 (1978); LARGENT 318 US 418, 87 LE 873, ____SC____(1942); BROWN ____ US____, 61 LE(2) 357, 99 SC ____(1979).

It is the intention of JOHN R. SITTON to proceed with this case. It is the intention of the undersigned attorney to carry it forward at no fee.

JOHN R. SITTON is indigent; he has some money, but an insufficient amount to foot the necessary costs (fees, expenses and attorney's fees) of this case. He has paid the undersigned some monies relative to other matters and $60.00 regarding this case, but has paid him no other monies. The undersigned has received nothing else for this case nor has he contracted for further payments, directly or indirectly.

The undersigned attorney feels that this case is meritorious and that the matter is of the utmost importance; that this is a case where constitutional rights are being overrun by the State of Texas; it is a case in which the Statute is so vague and overbroad that the rights of all peoples are being invaded contrary to the United States Constitution; and it is one in which the Court should intrude so that justice may be achieved.

Pursuant then, according to 28 USC Sec. 1915, the undersigned attorney hereby, under oath, says:

1. JOHN R. SITTON is unable to give costs or give security for the costs (or to pay a fee) of this lawsuit;

2. That JOHN R. SITTON is threatened by Art. 6701d, Sec. 166 TCS as enacted and as enforced by Respondent; and

3. JOHN R. SITTON and his attorney believe and allege it to be a fact that SITTON is entitled to redress before this Court; and further say that such redress is sought in good faith - all being made more manifest in the documents for Appeal and/or Certiorari attached hereto and the contents of which are incorporated herein the same as if here written word for word.

Further, attached hereto is an AFFIDAVIT of indigency by JOHN R. SITTON.

ACCORDINGLY, leave is requested to proceed in forma pauperis in this matter; that the Petition accompanying this Motion be filed; and that on final hearing hereof, justice be done.

RESPECTFULLY SO REQUESTED,

J. P. Darrouzet
Counsellor at Law
Suite No. G 10
812 San Antonio
Austin TX 78701
512 477 4210

(Member of the Bar of the Supreme Court of the United States)

ATTORNEY FOR PETITIONER,
JOHN R. SITTON

THE STATE OF TEXAS (
(
(
COUNTY OF TRAVIS (

BEFORE ME, the undersigned authority, on this day personally appeared J. P. DARROUZET who, upon his oath duly administered by me, deposed and said:

I am J. P. Darrouzet. I am an attorney and I am competent to give this affidavit. I hereby swear that all of the factual matters set forth in the foregoing MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS are true and correct to my own knowledge and belief.

J. P. Darrouzet

SWORN TO AND SUBSCRIBED before me, the undersigned authority, on this 12th day of Nov, 1980, to certify which witness my hand and seal of office.

Richard L Stocks
Notary Public in and for
Travis County, T e x a s

AFFIDAVIT

28 USC 1915

THE STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, on this day personally appeared JOHN R. SITTON who, upon his oath duly administered by me, deposed and said:

My name is John R. Sitton. I am the same person who was convicted of speeding in Cause No. 189,711 in the County Court at Law No. Two of Travis County, Texas (formerly No. 820694 in the Municipal Court of Austin, Travis County, Texas). I am indigent. I have no assets of any kind whatsoever. I have no credit; I have no friends from whom I can borrow money; I am indigent and destitute.

I was in such condition at the time of my trial before July of 1980, and have remained the same since. I am unable to pay costs herein or give security for same.

I have authorized J. P. DARROUZET of Austin, Travis County, Texas, to proceed with the Appeal of this case to its final conclusion, wherever that may end, including the Supreme Court of the United States.

John R. Sitton
JOHN R. SITTON

SWORN TO AND SUBSCRIBED before me, the undersigned authority, on this the 19th day of August, 1980.

Carolyn T. Marshall
Notary Public in and for
Travis County, Texas

CAROLYN T. MARSHALL
Notary Public, in and for Travis County, Texas
My Commission Expires December 31, 1980

RECEIVED
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SUPREME COURT, U.S.

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 1980

JOHN R. SITTON

vs NO. 80-5904

THE STATE OF TEXAS

STATE OF JURISDICITION ON APPEAL

and/or

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE COURT:

INTRODUCTION

A.

Sittorn was convicted of speeding in the Municipal Court of Austin, Travis County, Texas and appealed to the County Court at Law System of the State of Texas . He was found guilty and finded $25.00 by a jury. He desires to seek review in this case and his only Court is this one.

B.

Sitton is indigent as the affidavit attached to the Motion to proceed in Forma Pauperis attests. The undersigned attorney is not receiving any fee for this case nor has he been directly or indirectly promised one.

C.

Abbreviations would appear to speak for themselves. And to reduce reduncancy to a minimum this document shall combine the Statement and the Petition.

D.

This case is unreported in that the County Court at Law No. Two of Travis County, Texas is the Court of last resort under Texas law. BROWN v US ____US_____, 61 LE(2) 357, 99 SC _____ (1979). The "record of the case" is maintained by Hon. Doris Shropshire, County Clekr, County Court House, Austin Travis County, Texas 78701 (512/477 6188) No "opinion" exists in the case as the County Court at Law No. Two of Austin, Travis County, Texas is not a Court of Record.

E.

Sitton was charged with speeding under Art. 6701d, Sec. 166(a) TCS which reads that no person shall drive on a highway

> "... at a speed greater than is reasonable and prudent under the cirucmstances then existing."

and further says that unless - due to circumstances - a lower speed is required:

> " ... any speed in excess of the limits specified ...shall be prima facie evidence that the speed is not reasonalbe or prudent and that it is unlawful:
>
> 1. Thirty (30) miles per hour in any urban district." *

F.

Sitton was tried in said County Court at Law No. Two on 7/17/80 by a jury which returned its verdict the same day fining Sitton $25.00. On August 15th, 1980 the Court declared its judgment (Art. 42.01 TCCrP) which was made into an order pronouncing judgment on the same date (Art. 42.02 TCCrP).

G.

This Court has appellate jurisdicition under 28 USC 1257 (2) and certiorari jurisdictiion under 28 USC 1257 (3)

H.

BROWN 61 LE(2) 357, supra sustains this court' s jurisdicition; and the Constitutional provisions involved here are the 5th, 6th and 14th Amendments to the US Constitution and the Statutory provision involved are Art. 6701d, Sec. 166 et se q, Texas Civil Statutes (TCS).

I

The appellatequestion is:

> Did the Trial court err in deciding that Art. 6701d, Sec. 166 TCS et seq., is valid against Sitton's claim that the same is repugnant to the Constitution of the United States?

---

*"Urban District" is defined in Art. 6701d, Sec. 166 (a)(5)(c) TCS. It is also defined in Art. 6701d, Sec. 9(d) TCS. Cf. Art. 6701d, Sec. 17(a,b) TCS defining "business district" and "resident district".

The Certiorari question is:

> Essentially the same for the validity of the statute was "drawn into question on the ground of its being repugnant to the" US Constitution . Texas action is of urgent nature and should be scrutinized by this Court; it was probably contrary to the way this Court would (and has in the past) hold; and the Trial Court so far departed from the standards of due process and fairness that this Court should supervisionarily intervene.

J

The witness Alexander clocked Sitton at a speed greater than the prima facie limit where it was done. Aparet from alot of residences, there were no immediate hazards in the area. Sitton claims he wasn't going over the prima facie limit.

K.

Before the case went to trial Sitton challenged the validity of Art. 6701d, Sec. 166 et seq. via a Motion to Quash and again before the case went to the jury the Motion to Quash was reurged upon the Court which overulled the matter.

1. Art. 6701d, Sec. 166 TCS et seq. is unconsitutional because Texas , by legislation requires a culpable state of mind and the Court held that it didn't need one.

   Art. 6.06 PC

   MORISSETTE v US 342 US 246; 96 LE 288; /2 SC 240

2. Art. 6701d, Sec. 166 TCS et seq is unconstitutional because it sets no standards (other than a presumption, see below) and accordingly is void for vagueness.

   PAPACHRISTOU 31 LE(2) 110 (1972)
   PLUMMER 38 LE(2) 3
   NORWELL 38 LE(2) 170
   GESS 38 LE(2) 303
   HARRISS 98 LE 989
   WINTERS 92 LE 840

   NOWAK: Constitutional 1978 p.726 et seq.

3. Art. 6701d, Sec. 166 TCS is unconstitutional in that conviction under the same must (and certainly did in the case at bar) rest upon a presumption which does not flow from the proven fact beyond a reasonable doubt.

This argument rest upon the State law of Texas that requires the proof of the essential elements of any offense and makes it clear that the essential element (or rather one essential element)of speeding is un-reasonableness and im-prudency.

SANDSTROM v MONTANA 61 LE(2) 39
ULSTER COUNTY COURT v ALLEN
60 LE(2) 777

Under State ruleings by the Texas Court of Criminal Appeals, the presumption of the prima facie speed law is a burden shifting presumption, see THOMAS 474 SW(2) 692 which is condemned in SANDSTROM and ULSTER COUNTY.

4. Art. 6701d, Sec. 166 TCS et seq. is unconstitutional as violative of substantive due process since it goes into an area prohibited to the Legislature unless definitive standards are set forth and none are.

Texas is committed to the proposition that everyone has a "natural right" to use the streets SAN ANTONIO v FETZER 241 SW 1034. Such rights under the 9th Amendment to the US Constitution may not be interferred with without some rational relationship between the evil sought to be curtailed and the infringement of the right and this must be done reasonably.

Here the curtailment is done only by the "amorphous" terms reasonalbe and prudent; See PAYTON v NY 63 LE(2) 639 at 659.

L.

It would seem that little argument need be given to show that the matters here are substantial Federal Questions. Well over thirty states have prima facie speed laws and the requirment of the 55 mph limit for the receipt of Federal Funds is so well known that repition would only burden this Statement and/or Petition.

Cf. Wright: FEDERAL PRACTICE AND PROCEDURE JURISDICITION Secs. 3564 and 4014.

PRAYER

Relief and Justice are respectfully prayed .

J. P. Darrouzet
ATTORNEY FOR APPELLANT-PETITIONER

NO. 189-711

THE STATE OF TEXAS | IN THE COUNTY COURT AT LAW

VS | NO. 2

John R. Sitton | TRAVIS COUNTY, TEXAS

On this the 18 day of July, A. D. 1980, this cause being called for trial, came the State of Texas, by her County Attorney, and came the Defendant in person and by his attorney, and the Defendant, being duly arraigned, pleaded "NOT GUILTY" to the charge contained in the information, to-wit:

Speeding.

Both parties announcing ready for trial, a jury of six good and lawful persons, to-wit: John B. Lenn and five others, was duly selected, impaneled and sworn, according to law, who having heard the information read and the Defendant's plea of Not Guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, and having heard the argument of counsel, retired to consider of their verdict, and afterward returned into open court the following verdict, which was received by the Court and is here now entered upon the minutes of the Court, to-wit:

"We, the Jury, find the Defendant John R. Sitton, Guilty and recess for sentencing to August 15, 1980.

John B. Lenn
Foreman of the Jury".

On this the 15 day of August, A. D. 1980,

It is the Order of the Court that the said Defendant John R. Sitton, is guilty of the offense of Speeding, as found by the Jury, and assesses his punishment at Twenty-Five Dollars ($25.00) and Court Costs.

IT IS ORDERED AND DECREED that the State of Texas do have and recover of the said Defendant the amount of such fine and all costs in this prosecution, for which execution may issue; ~~that commitment issue on or before _____, and that, at the time of the issuance of the commitment, Defendant be remanded to the custody of the Sheriff of Travis County, Texas, who shall commit him forthwith to the jail of said County until said period of imprisonment has expired and thereafter until said fine and costs are fully paid or otherwise discharged.~~ Defendant gives verbal notice of appeal.

FILED AT 10:50 A.M.
August 15, 1980

Bob Perkins
JUDGE PRESIDING

DORIS SHROPSHIRE
COUNTY CLERK, TRAVIS COUNTY, TEXAS
By B. Davis Deputy

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No. 80-5904

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOHN R. SITTON, Appellant,

VS

THE STATE OF TEXAS, Appellee.

On Appeal from the County Court at Law No. Two
of Travis County, Texas

MOTION TO DISMISS OR AFFIRM

Margaret Moore
Travis County Attorney
Attorney for Appellee

Travis County Courthouse
P.O. Box 1748
Austin, Texas 78767
(512) 478-3415

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STATUTES:

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TREATISE:

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No. 80-5904

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOHN R. SITTON, Appellant,

VS

THE STATE OF TEXAS, Appellee.

On Appeal from the County Court at Law No. Two
of Travis County, Texas

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, respectfully moves this honorable Court to dismiss the above entitled appeal on the ground that no substantial federal question is presented, or, in the alternative, to affirm the judgment of the County Court at Law No. Two of Travis County, Texas, on the ground that it is manifest that the questions on which the decision of the cause depend are so unsubstantial as no to need further argument.

STATEMENT

Appellant was convicted of speeding under TEX. REV. CIV. STAT. ANN. Art 6701d, Sec. 166(a) (Vernon), in the County Court at Law No. Two of Travis County, Texas. Under Texas law, an offense under this statute is a misdemeanor. TEX. REV. CIV. STAT. ANN. Art. 6701d, Sec. 22 (Vernon). The statute in question provides in pertinent part:

> "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent

under the circumstances then existing. Except when a special hazard exists that requires lower speeds for compliance with paragraph (b) of this section, the limits specified in this Section or established as hereinafter authorized shall be lawful, but any speed in excess of the limits specified in this Section or established as hereinafter authorizes shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful:

1. Thirty (30) miles per hour in any urban district;..."

****

The evidence adduced at trial showed Appellant had been traveling at approximately 45 miles per hour on a street in an urban district.

QUESTION PRESENTED

WHETHER OR NOT ART. 6701d, Sec. 166(a) IS REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT

1. Lack of a Requirement of a Culpable Mental State Does Not Render the Statute Unconstitutional.

Appellant complains that the statute in question, Art. 6701d, Sec. 166 et seq., TEX. REV. CIV. STAT. ANN. (VERNON), "is unconstitutional because Texas, by legislation requires a culpable state of mind and the Court held that it didn't need one."

Appellee interprets this complaint to mean that the statute, as construed by the trial court, is unconstitutional due to lack of a requirement of a culpable mental state.

The Texas Court of Criminal Appeals, the court of last resort for review of state criminal offenses, in construing the statute in question, held that the legislature intended to and did dispense with a culpable mental state as an element of the offense. Zulauf v. State of Texas, 591 S.W.2d 869,873 (1980). Appellant's contention that lack of such element renders a speeding statute unconstitutional is contrary to the prior cases of this Court.

In Morissette v. United States, 342 U.S. 246 (1952), Justice Jackson discussed the problem of distinguishing between crimes that require a mental element and crimes that do not. In the case he reviewed the evolution of so-called public welfare offenses, and in holding that intent may not be eliminated from criminal offenses incorporated from the common law, suggests that intent may be eliminated from certain public welfare offenses such as violations

of traffic regulations and motor vehicle laws. Morissette v. United States, 342 U.S. at 246-249,n.20.

This position was re-stated in United States v. Freed, 401 U.S. 601 (1971), in which the Court held that while the presence of mens rea has long been a requirement of criminal responsibility, the list of exceptions to that requirement has grown, especially in the expanding regulatory area over activities involving public health, safety, and welfare. United States v. Freed, supra, at 607.

Appellant's position that this Court requires a speeding statute to create an offense which contains the element of intent in order to be constitutional is therefore without merit.

2. The Statute Does Not Violate Due Process Requirements of Definiteness.

Appellant complains that the statute in question is void for vagueness because it sets no standards. Yet the statute does set a standard: to drive at a speed no greater than is reasonable and prudent under the circumstances. The fact that the standard is measured by the words "reasonable and prudent" does not render the statute objectionable upon constitutional grounds.

The test is whether the language conveys sufficient warning as to the proscribed conduct when measured by common understanding and practices. Jordan v. De George, 341 U.S. 223,231 (1951) The words of the statute are simple and their meaning should be well known to operators of motor vehicles, who, by virtue of the requirements of obtaining a license, know or should know what speed is proper and reasonable under different traffic conditions. See State v. Coppes, 247 Iowa 1057, 78 N.W.2d 10 (1956).

Appellant's position is, in effect, that a man should not be held responsible in a criminal offense for knowing what is reasonable. Such a position is unsound. The legislature merely wrote into the statute what has become known as the "rule of reason" ever since Standard Oil Company of New Jersey v. United States, 221 U.S.1 (1912), and United States v. American Tobacco Company, 221 U.S. 106 (1912) were decided by this Court. In these

cases the Court held that the Anti-Trust Act was not a denial of all restraint of trade, but only a denial of unreasonable restraint of trade. It can hardly be suggested that this Court read into the statute something that made it so indefinite and uncertain that it was incapable of advising the public as to what was or was not an offense under it. See State v. Schaeffer, 96 Ohio St. 215, 117 N.E. 220 (1917).

Appellant cites as support for his contention that the statute is umpermissibly vague numerous cases of this Court which in fact are not in point. Those cases dealt with statutes which infringed upon First Amendment rights either in their form or in the manner in which they were applied. This Court has stated that it will go far to uphold state or federal statutes which deal with offenses difficult to define when they are not intertwined with limits on free expression. Winters v. New York, 333 U.S. 507 (1948). The offense of speeding is difficult to define because it is virtually impossible to set out specific rates of speed to cover innumerable conceivable conditions of weather, traffic density, pedestrian density, street wear, and so on. Appellee urges that the statute in question is as definite and certain as the subject matter will permit, and is a valid legislative effort to provide a statute sufficiently elastic and adaptable to meet all the dangerous situations presented. The Constitution does not require impossible standards of specificity. See United States v. Petrillo, 332 U.S.1 (1947).

The great weight of authority throughout the United States is in favor of validity in the face of due process challenges of speeding statutes which contain provisions for measuring the legal rate of speed by reasonableness. See 6 A.L.R.3d 1326. When Texas in the case of Eaves v. State, 171 Tex. Crim. 670, 353 S.W.2d 231 held the statute in the case at bar to be constitutionally definite, thirty state legislatures had adopted similar statutes and the Supreme Courts of sixteen of those states had held the statutes constitutional. Gano v. State of Texas, 466 S.W.2d 730, 732 (1971).

Appellant's complaint that the statute violates due process requirements of definiteness is therefore without merit.

3. The Texas Law on Prima Facie Evidence Does Not Create a Burden-Shifting Presumption.

Appellant mistakenly complains that under Texas law, "the presumption of the prima facie speed law is a burden shifting presumption,..." Appellee would like to clarify the position of Texas law regarding prima facie evidence.

A leading Texas case held that prima facie evidence is not a presumption, but is merely proof of the case, upon which a jury may find a verdict, unless rebutted by other evidence, and that making out a prima facie case does not change the burden of proof. Floeck v. State, 34 Tex. Crim. 314, 30 S.W. 794, 797 (1895). Failure to define "prima facie evidence" for a jury is reversible error. Thomas v. State of Texas, 474 S.W.2d 692 (1972). If the jury is not told, as a matter of law, to find a defendant guilty upon such evidence, but is left by the charge free to weigh the prima facie evidence, together with all the other testimony, in connection with the reasonable doubt and presumption of innocence to which a defendant is entitled in every criminal trial, and to render their verdict accordingly, then the jury has been properly charged. Thomas v. State, supra, at 695, Floeck v. State, supra, at 798.

This Court held that if the actual words spoken to the jury would leave a reasonable juror to interpret the instruction as a conclusive presumption or a burden-shifting presumption with regard to intent, either would deprive the defendant to the right to due process of law by violating the requirement of the Fourteenth Amendment that the State prove every element of a criminal offense beyond a reasonable doubt. Sandstrom v. Montana, 442 U.S. 510 (1979).

A comparison of the Texas rule with the rule established by this Court shows there is no conflict. Appellant's complaint on this ground is wholly frivolous.

4. The Statute Does Not Violate Substantive Due Process Standards.

Appellant complains that there is no rational relationship between the evil sought to be curtailed and the infringement of the right. The right in this case is a Texas citizen's natural right to use the public streets. The evil sought to be curtailed is use

of the public streets by motor vehicle operators in such a way as to create a hazard to the public. Appellant's argument that there is no rational relationship between requiring motor vehicle operators drive at speeds reasonable and prudent under the circumstances, and protecting the public, is clearly without merit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal should be dismissed, or, in the alternative, the judgment of the County Court at Law No. Two, Travis County, Texas, should be affirmed.

Margaret Moore

Margaret Moore
Attorney for Appellee

PROOF OF SERVICE

I, Sally Elizabeth Swanson, a clerk in the office of the County Attorney for Travis County, Texas, Appellee herein, depose and say that on the 14th day of January, 1981, I served a copy of the foregoing Motion to Dismiss or Affirm on John R. Sitton, Appellant herein, by personally delivering same to Carolyn T. Marshall, in the offices of J.P. Darrouzet, counsel of record for said John R. Sitton, located at Suite No. G-10, 812 San Antonio, Austin, Texas, in compliance with Rule 28.3 of the Rules of the Supreme Court of the United States.

All parties required to be served have been served.

John R. Sitton, through his attorney,

J. P. Darrouzet, Suite No. G-10, 812 San Antonio

Austin, Texas

Sally Elizabeth Swanson

Sally Elizabeth Swanson

Subscribed and sworn to before me, at 2:05, this 14th day of January, 1981.

Cynthia Hill

CYNTHIA HILL

Travis County, Texas

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SUPREME COURT, U.S.

NO. 80 - 5904

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

ORIGINAL COPY

JOHN R. SITTON

Appellant-Petitioner

vs

THE STATE OF TEXAS

Appellee-Respondent

REPLY TO MOTION TO DISMISS

OR AFFIRM

ATTORNEY FOR APPELLANT-PETITIONER

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1/

NO. 80 - 5904

IN THE SUPREME COURT OF THE UNITED STATES

JOHN R. SITTON Appellant-Petitioner

vs

THE STATE OF TEXAS Appellee-Respondent

REPLY TO MOTION TO DISMISS OR AFFIRM

TO THE HONORABLE COURT:

INTRODUCTION

SITTON in his STATEMENT OF JURISDICTION AND/OR PETITION FOR WRIT OF CERTIORARI raised four problems for this Court's consideration:

K(1) The Texas law requires a culpable state of mind for the offense of speeding; yet the Trial Court (Court of last resort in this case) held that none was needed.

K(2) The Texas speeding law is unconstitutionally vague.

K(3) The Texas speeding law is unconstitutional because conviction under it rests upon a burden-shifting presumption.

K(4) The Texas speeding law violates substantive due process because it is legislation in an area without standards; and the Legislature cannot do this in the way in which it did.

Although the substance of the answer filed herein by the Travis County Attorney in her MOTION TO DISMISS OR AFFIRM is somewhat uncertain, she, at least, spoke to each problem above (under her ARGUMENT, p.2) using arabic numbers. This REPLY will be in kind - so that the problems as presented, as answered and as rebutted will be:

IN THE STATEMENT and/or PETITION	IN THE MOTION TO DISMISS OR AFFIRM	IN THIS REPLY
K(1)	1.	I(Mens Rea)
K(2)	2.	II(Vagueness)
K(3)	3.	III(Presumption)
K(4)	4.	IV(Substantive Due Process)

I (MENS REA)

The Travis County Attorney missed the point of SITTON'S first problem. She simply says that crimes can exist that require no mens rea. With this SITTON has no quarrel. She further says that such is the case with speeding, and with this - in general - SITTON again has no quarrel. But she finally concludes that such is the case in Texas, and with this SITTON quarrels vigorously and says:

A.

a. In 1973 (to take effect 1/1/74) the Legislature of Texas adopted a new penal code (unless otherwise noted, this shall be referred to as PC).

b. In the PD, nothing constituted

> "... an offense unless it is defined as an offense by statute, municipal ordinance, order of a county commissioners court, or rule authorized by and lawfully adopted under a statute." Sec. 1.03(a) PC.

c. Titles 1, 2 and 3 of the PC (consisting of Sec. 1.01 through Sec. 12.51 inclusive) applied not only to "crimes" or "offenses" set out in the PC but

> "... to offenses defined by other laws,..." Sec. 1.03(b) PC.
>
> (Accordingly Titles 1, 2 and 3 PC apply to Art. 6701d Texas Civil Statutes [herein TCS] which contains Sec. 166, otherwise the Texas speeding law.)

d. Furthermore the PC defined the elements of any offense as:

> "(A) the forbidden conduct;
> (B) the required culpability;
> (C) any required result; and
> (D) the negation of any exception to the offense." Sec. 1.07(a)(13) PC.

e. Further, and most important(!), the PC provided that

> "... a person does not commit an offense unless he intentionally, knowingly, recklessly, or with criminal negligence engages in conduct as the definition of the offense requires." Sec. 6.01(b) PC.

f. The only thing excepted from this requirement of "culpability" or "mens rea", was, where the statute (defining the crime) "plainly" dispenses with such a requirement:

> "If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element." Sec. 6.02(b) PC.
>
> (All underlining or emphasis is by the writer unless otherwise specifically noted.)

g. And further:

> "If the definition of an offense does not prescribe a culpable mental state, but one is nevertheless required under Subsection (b) of this section, intent, knowledge, or recklessness suffices to establish criminal responsibility." Sec. 6.02(c) PC.
>
> (Simple negligence accordingly will not suffice to impose criminal responsibility COLE v STATE 556 SW(2) 343.)

h. Hence the law of Texas underwent a change.

> "... the Court in prior cases held that such knowledge need not be alleged in the indictment, but if lack of knowledge were raised by the evidence, the jury must be cahrged to axquit if there were a reasonable doubt on the matter... . ... Under the new penal code, in constrast, the culpable mental state is expressly made, not a defense, but an element of the offense, V. T. C. A., Penal Code Sec. 1.07(a)(13)(B), and this is so even where the culpable mental state is not expressly stated in the statutory definition of the offense. Sec. 6.02 (b),..." GOSS v STATE 587 SW(2) 782.

i. Nowhere in Art. 6701d, Sec. 165 TCS does the Legislature "plainly" dispense with the requirement of culpability

> (See the quotation of the speeding law in the Travis County Attorney's MOTION TO DISMISS OR AFFIRM beginning on p. 1. It is difficult to prove a negative; BUT A READING OF THE ENTIRETY of Art. 6701d TCS [otherwise known as the traffic code of Texas] will reflect that nowhere does the Legislature "plainly" dispense with the requirement of culpability for the violation of any section of that code.)

B.

In very early days this Court considered the question of whether the (any) Legislature could eliminate the requirement of "mens rea" from an act for which criminal responsibility ensued. Two of the earliest and most cited cases are US v BALINT 258 US; 66 LE 604; 42 SC 301, and US v BEHRMAN 258 US 280; 66 LE 619; 42 SC 303.

> "In those cases this Court did not construe mere omission from a criminal enactment of any mention of criminal intent as dispensing with it." MORISETTE, infra.

BALINT mde the question of dispensing with mens rea "...a question of legislative intent to be construed by the court..."

The next case of import to appear in this area was US v DOTTERWEICH 320 US 277; 88 LE 48; 64 SC 134:

"The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct - awareness of some wrong doing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."

citing BALINT.

In 1951 this Court decided that a comprehensive discussion of the matter was needed so it chose MORISETTE v US 342 US 246; 96 LE 288; 72 SC 240 to do it. The offesne was a violation of 18 USC 641 (purloining government property). Morisette had taken three tons of bomb casings from a bombing range and sold them. No (culpability) mens rea was alleged nor proven.

The Court went into the history of the requirement of mens rea and pointed out the "accelerating tendency"..."to call into existence new duties and crimes which disregard any ingredient of intent...". Among other types of crimes discussed as a resultant of the "industrial revolution" was that relating to "(T)raffic of velocities, volumns and varieties unheard of, came to subject the wayfarer to intolerable casualty risks if owners and drivers were not to observe new cares and uniformities of conduct."

BUT THERE IS ONE THING THA MORISETTE MAKES CLEAR. IT IS TALKING ABOUT LEGISLATION, NOT COURT CONSTRUCTION - NOT COURT LEGISLATION.

Hence says the Court "legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element."

The Court as noted above, says that in BALINT congressional intent was ofund to eliminate the requirement of mens rea. And in MORISETTE this Court found legislative intent to do the same. The most that can be said of MORISETTE on this matter is its quotation from BEHRMAN:

"If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intnet."

(Even assuming that this statement is so, it is not applicable in Texas for as shown above the Texas Legislature maked culpability a requirement unless the same is plainly dispensed with in the legislative definintion of the offense, which it is not in speeding.)

In 1957 LAMBERT v CALIFORNIA 355 US 225; 2 LE(2) 228; 78 SC 240 appearedand this Court said:

> *"There is a wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition."*

And fourteen years later in US v FREED 401 US 601; 28 LE(2) 356; 91 SC 1112 this Court in considering an offense under the National Firearms Act held that Congress had eliminated the requirement of mens rea for criminal responsibility and to do so it quoted BALINT:

> *"Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided."*

C.

This is the basis for the following propositions:

> *The Legislature can create a species of crime where culpability is eliminated as a required "element" of the offense.*
>
> *A court cannot take legislation which does not plainly dispense with the leement of culpability and judicially legislate such a dispensation.*

BUT IN TEXAS

> *THE LEGISLATURE SAYS THAT EITHER IT OR ITS DELEGEES ARE THE MAKERS OF "CRIME" OR "OFFENSES";*
>
> *FURTHER THE LEGISLATURE SAYS THAT CULPABILITY IS A MANDATORY REQUIREMENT FOR CRIME, AND EVEN IF THE DEFINITION OF AN OFFENSE HAS NO REQUIREMENT OF CULPABILIYT ONE IS NEVERTHELESS REQUIRED AS AN ELEMENT OF THE OFFENSE UNLESS IT IS PLAINLY DISPENSED WITH.*
>
> *FURTHER UNDER THE SPEEDING LAW OF TEXAS CULPABILITY HAS NOT BEEN PLAINLY DISPENSED WITH.*

Accordingly under the teachings of this Court the conviction here must fail because no culpability was require at trial, and hence SITTON was denied his Constitutional rights.

D.

This Court - nor any court for that matter - cannot LEGISLATE (except "interstitially" to resolve ambiguities, SAXBE v BUSTOS 418 US 65; 42 LE[2] 231; 95 SC 272).

This proposition is so well established as to stand on its own; however if authority is necessary one can begin in 1885 with THORNLEY v US 113 US 310; 28 LE 999; 5 SC 491 and travel through LOUISVILLE & NRCo v CENTRAL STOCK YARDS 212 US 132; 53 LE 441; 29 SC 246 and DEWEY v US 178 US 510; 44 LE 1170; 20 SC 981 to a condemnation of statutory improvement as a motive for construing statutes other than what they say US v CALAMARO 345 US 351; 1 LE(2) 1394; 77 SC 1138 to the condemnation of statutory construction of social policy motivated by personal inclinations EVANS v ABNEY 396 US 435; 24 LE(2) 634; 90 SC 628.

(Little research would be needed to verify the fact that courts do not have the constitutional power to legislate even under the guise of "construction" or "interpretation". Cf. the Digest System under Const. Law, Key 70.)

In Texas from the earliest days the same law obtained. Cr. 8A Tex. Dig. Const. Law Key 70(1) et seq. As recent as Ex Parte DAVIS 412 SW(2) 46 the Court of Criminal Appeals of Texas (its highest court in criminal matters herein referred to CCrA) held that the fixing of penalties was a Legislative Matter and not for the courts, and in SLAGLE v STATE 570 SW(2) 916 the CCrA echoing its long history said that the appropriateness of a presumption of intoxication was a Legislative Decision, the construction of which "... is foreclosed by the Legislature's judgment..." as reflected by the act creating the presumption. In short where the Legislature has plainly spoken , it makes no difference if such pronouncements may be (or need to be) improved, nor if they can be made better societally, nor if the personal inclination of a judge wants them to be otherwise, nor for any other reason may a court change what the Legislature has said.

(The inevitable line between Constitutional permissibility and impermissibility begins to emerge from the cloud that lies between true Judicial "construction" - or "interstitial" legislation for clarification of ambiguities [a form of "construction], see SAXBE, supra - and true Judicial "Legislation". FOR if one is into construction one is in the area of constitutionally delegated judicial functions; whereas if one crosses the line one violates the constitutional mandate of division of powers. A Court canno Constitutionally Legislate.)

ACCORDINGLY, here, the problem is manifest. The Texas Legislature has spoken. Speeding requires a culpable state of mind unless the Legislature "plainly" dispenses with such a requirement which it has not done. By the lower court eliminating such a requirement it denied SITTON due process of law.

F.

One more thing need to be discussed here and this is ZULAUF v STATE 591 SW(2) 869.

ZULAUF was convicted of speeding, fined and appealed his case to the CCrA. His second point of error wsa that the complaint (which is the operable paper in a speeding offense in Texas, Art. 45.01 Texas Code of Criminal Procedure, herein TCCrP) was fundamentally defective for failure to allege a culpable state of mind. The CCrA disagreed and in doing so gave its reasons, as it must do by Statutory Mandate, Art. 44.24 TCCrP as follows:

1. *"The clear command of Article 6701d, Sec. 166, supra, that:*

   '...(n)o person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the circumstances then existing...'

   provides more than adeuate support for our holding herein that the Legislature intended to make

speeding a strict liability offense where liability would not be contingent upon the allegation of a culpable mental state."

(the emphasis on the words shown above was put on them by the CCrA)

(See below).

2. The CCrA relied on GOODWIN v STATE 138 SW 399 and quoted from that opinion as follows:

"Very few people in driving a car have an evil intent; but the Legislature, in protection of the public, has decreed it wise to limit the speed at which these cars may run, and each one is required to keep within that limit."

(GOODWIN was a 1911 case at which time Texas had a rigid speed limit, i.e. no car may travel faster than X miles per hour; and it was decided at a time when "no culpability" was a defense, not an element of an offense which had to be proven by the prosecution, supra.)

3. Then the CCrA referred to VALLEJO v STATE 408 SW(2) 113; WILSON v STATE 328 SW(2) 311 and ROWLAND v STATE 311 SW(2) 831 for the proposition that similar complaints had been held sufficient

"... notwithstanding the lack of a culpable mental state..."

(None of those cases raised the issue of invalidity due to lack of a culpable mental state.)

4. Then the CCrA says that it has repeatedly held that no culpable state was requried for intoxicated driving and cites GREER v STATE 544 SS(2) 125; Ex Parte ROSS 522 SW(2) 214 and OWEN v STATE 525 SW(2) 164.

(DWI really has nothing to do with speeding. Furthermore in Chapter Eight and Chapter Nineteen of the PC the Legislature deliberately and very "plainly" dispensed with a mental state in any crime involving intoxicants, see infra.)

5. Finally the CCrA says:

"Given the absolutely obligatory character of the language consistently used by the Letislature in denouncing the offense of speeding, we are satisfied that the Legislature intended to and has dispensed with a culpable mental state as an element of the offense."

First of all the CCrA is clearly Legislating here in violation of the Constitution of the State of Texas and the Constitution of the United States . The Judiciary cannot Legislate. Yet the CCrA has done so here. How? By saying that since the Legislature used the word "shall" it expressed an intent to eliminate or dispense with a mens rea or a mental state in the crime or offense of speeding.

The absolute irrationality of this is shown in GOSS v STATE 582 SW(2) 782 and ROGERS v STATE 589 SW(2) 132 where a mental state or mens rea or culpable state of mind was found to be necessary for violation of Art. 6701d, Secs. 38 adn 40 TCS (failure to stop and render aid). Those sections of the same Art. 6701d TCS (wherein is legislated the speeding law) say that a driver "shall" stop; "shall" return; "shall" reaimn at the scene; "shall" do so without obstructing traffic; "shall" give his name; "shall" if requested exhibit his license; and "shall" render reasonable assistance. In short, where "shall" is used six (6) times the CCrA found no express or plain dispensation of culpability; yet where "shall" was used once (1) it was a "clear command", it was "more than adequate support", and it was of an "absolutely obligatory character" to show legislative intent to expressly and/or "plainly" dispense with the requirement of culpability.

The terrible irony of this is that in BROWN v STATE 600 SW(2) 834 the very same Judge who wrote the tuilty words of ZULAUF vigorously reaffirmed the holding of GOSS and ROGERS that Art. 6701d, Secs. 38 and 40 TCS require a culpable state of mind (where the statute used the word "shall" six times):

(And in another posture the same Judge wrote words like

> "Given the heavy emphasis in the penal code on existence of one or another culpable mental state as an element of a penal offense..."

and

> "Instead of adapting an outmoded rationale we should insist that a felony murder indictment state outright the appropriate culpable mental state in relation to commission of the acts that cause death."

and dissented becasue the CCrA refused to require a culpable state of mind be alleged in an "attempt" type crime. Ex Parte BAILEY 600 SW[2] 333.)

In MORISETTE, as quoted above, this Court noted that BALINT and BEHRMAN had not used the absence of a required intent in the statute to find legislative intent to eliminate it as an essential element of a crime.

(Nor did MORISETTE - nor any other case - ever hold that if the legislature did in fact eliminat it, that couldn't be used as a defense, i. e. that the lack of intent due to accident, mistake of fact, insanity, etc., couldn't be

used as a defense. Yet the CCrA did, for in HERNANDEZ v STATE an unpublished per curiam opinion the CCrA held that mistake of fact couldn't be used as a defense to speeding. HERNANDEZ appears (by reference only) in 579 SW(2) 478, but its opinion reflecting the CCrA's "reasons" for its judgment was not published under the local rules. A copy of the opinion is attached, and since the CCrA is required by Art. 44.24 TCCrP to give their "reasons" - such opinion becomes a part of that vast body of law called stare decisis and may be used - especially to show what the highest court of any state has done. The absolute inanity of the CCrA's position in this matter is made manifest. If a criminal coerced one into speeding at gun point, the driver is guilty of speeding; if an accident occurred such as braking on a hill and sliding to 40 mph in a a 30 mph prima facie zone, then one is guilty; the list is endless and each as irrational as the next. Even though voluntariness is a statutory mandate for the commission of and "offense", Sec. 6.01[a] PC , it isn't for speeding according to the CCrA. Every statutory defense (Chapter Eight PC) is now totally denied to a defendant charged with speeding - and all because the CCrA decided on its own that the word "shall" evidenced a Legislative Intent to eliminate or "plainly" dispense with the requirement of culpability in the offense of speeding.)

The bottom line here is that SITTON was denied due process of law because the trial court below in the face of a Legislative Mandate denied him the right to have the case thrown out (or at least refiled) for the want of an allegation of culpability (which caused the complaint to spell out no crime) and denied him the right to have the jury determine if he had the required culpability (required, that is, by the Legislature).

(Note: How does the legislature "plainly" dispense with the requirement of culpability? Certainly no one would seriously contend that a specific express dispensation would be invalid - or unconstitutional. Agains the Legislature may, by ancilliary acts, dispense with the requirement of culpability, thus in ROSS the CCrA determined that the Legislature had expressly dispensed with the requirement of culpability in cases invovling intoxicants because in Sec. 8.04(d) PC and Sec. 19.05(b) PC the Legislature defined "intoxication" to mean that the person involved doesn't have the normal use of his mental faculties, thus making any kind of mental state irrelevant. May the Legislature "plainly" dispense with the requirement of culpability by moving one statute from one number to another? Or by a change in its content? This is suggested in AMERICAN PLANT v STATE 587 SW[2] 679, and ZULAUF cited AMERICAN PLANT ; BUT if this is sothen the requirement of culpability was reinstated in the Texas speeding law since Texas changed its speeding law from a "rigid" law which clearly dispenses with culpability - to the more flexible prima facie reasonable and prudent law in 1951, where the requirement of culpability is clearly implied by using the word "reasonable" for it is impossible to something that is "unreasonable" without knowledge or a mental state of some sort or another. Viz., see FIRST CITY N. BANK v JAPHET 390 SW[2] 70, Ct. Civ. Apps. Houston, 1965, Appl. for Writ of Err. Den'd. by Sup. Ct. for want of Jurisdiction, in which it was held that a man was not guilty of negligence when where he suffered a heart attack and lost consciousness, cr. Rest. Torts Sec. 166. In any event the Legislature, it is submitted, cannot "plainly" dispense with culpability by using the word "shall" only as ZULAUF says it did. ZULAUF crossed the dimly perceived line between Consitutionally permissible judicial construction into Constitutionally impermissible judicial legislation. If the use of "shall" (the mandatory form of to-be) permits such a judicial construction of the speeding statute, then the CCrA could use the same device to eliminate the requirement of culpability from any defined crime where the mandatory form of

of any verb is used. Such is irrationality carried to sublime heights.

II (VAGUENESS)

Once more the Travis County Attorney misses the problem SITTON has raised.

Texas has a longish history of the void-for-vagueness doctrine:

In GRIFFIN 218 SW 294 (1920), the Court held void for vagueness a statute which proscribed the operation of a car at night with headlights which would seriously interfere with an oncoming car or temporarily blind an oncoming driver because - whether or not the act was a crime - it was

> "...made to depend largely upon the peculiarities that may affect the vision of the driver of the approaching vehicle.
>
> That the statute is commendable in purpose, that it strikes at an annoying evil, is not to be questioned; but its terms are so vague that we are constrained to hold that, under the principles obtaining in the framing of criminal statutes, it is inoperative and unenforceable as denouncing a crime."

In ANDERSON 21 SW(2) 499 (1929), the disguise statute was held void for vagueness because the criminal act was made to depend upon the beholder or the person offended.

In WILSON 59 SW(2) 399 (1933), the Court threw out the first DWI statute as being void for vagueness.

In CHERNOWSKY 217 SW(2) 673 (1949) the Court declared void for vagueness Art. 6701d, Sec. 51 TCS which made it an offense to drive (recklessly)

> "Without due caution or circumspection"

relying on GRIFFIN, supra.

In IRVEN 136 SW(2) 608 (1940) the Court declared that part of the liquor law void for vagueness which made certain acts offensive to public decency and used the GRIFFIN teaching to do so.

In PIERCE 75 SW(2) 264 (1934), the Court held a Houston ordinance void for vagueness which proscribed the distribution of "bills, or paper and advertising matter", relying on GRIFFIN.

(They also threw it out for substantive due process.)

In MEADOWS 109 SW(2) 1061 (1937) the Court held void for vagueness a Dallas ordinance making it illegal to drive (recklessly) in wanton disregard for the safety of persons or property relying on the GRIFFIN doctrine.

The Supreme Court of the State of Texas has relied on the GRIFFIN teachings to hold a part of the Sunday Law unconstitutional as void for vagueness in STATE v SHOPPERS WORLD, INC. 380 SW(2) 107 (1964).

And in 1932, the Commission of Appeals in ABBOTT vs ANDREWS 45 SW(2) 568 held that a statute providing that slow moving vehicles should keep to the right was void for vagueness using GRIFFIN. And twice in 1925, in GALVESTON H&SA vs DUTY 277 SW 1057, and in INTERNATIONAL & GN vs MALLARD 277 SW 1051, the Commission of Appeals held that GRIFFIN controlled the validity of a statute requiring a car - where the vision was obscured - to cross a railroad track at 6 mph. It declared the statute void for vagueness.

In 1942 the Court of Civil Appeals in Austin, in RR COMM. vs FT. WORTH & DC 161 SW(2) 560 used GRIFFIN to declare a statute void for vagueness which provided that a railroad could not use more than one engine except when going up a "steep grade".

In the recent HOWARD case (No. 56,991, 9/19/79) the CCA held that the loitering ordinance of the City of Austin was void for vagueness because it made it an offense to be in a public or private place

> "...without being able to give a satisfactory account..."

for being there; and there was nothing in the statute which defined

> "satisfactory account"

AND

> "..., such a standard delegates unguided and unrestrained discretion to the arresting officer to decide what answers given by a potential arrestee are 'satisfactory accounts' and which are not."

Also see NOWAK: CONSTITUTIONAL LAW (1978) at pages 726 etc.

(A copy of the HOWARD opinion is attached.)

In short, the doctrine is clear both in Texas as well as in this Court:

> *If a statute is so framed as to permit criminality-content to rest in the judgment of some third party, the courts, or the arresting police-person; or*
>
> *if the statute is framed so as to fail to give fair notice of the forbidden conduct*

then the statute is impermissible under the Constitution of the United States, PAPACHRISTOU v JACKSONVILLE 405 US 156; 31 LE(2) 110; 92 SC 839.

In 1885, in US v REESE 92 US 214; 23 LE 563; ___SC ___, this Court said:

> *"It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could rightfully be detained and who could be set at large."*

MICHIGAN v DeFILLIPPO 443 US 31; 61 LE(2) 343; 99 SC 2627, held that police are not required to predetermine the constitutionality of a law they are supposed to enforce

"... with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. Society would be ill served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement."

Certainty is requried of statutes particularly criminal statutes. The forbidden conduct must be made apparent from the statute so that reasonable men can know what their Legislature has determined to be their rightful or wrongful conduct. The Criminality-Content of a statute cannot be left up to a third party, to the courts or to the police. To do so is to put the standart for crime into the hands of an individual when the Soverign is the sole purveyor of what is or isn't a crime. Cr. 21 AJ(2) 97, Crim. Law Sec. 17. See also RAEBECK v NY 391 US 462; 20 LE(2) 741; 88 SC 1716.

6 ALR(3) 1326 does not reflect that the great weight of authority throughout the Untied States is in favor of the validity of such statutes as the Texas speeding law. The article does show that a divergence exists in various courts as to the vagueness of some such statutes as opposed to the clarity of others.

16 LE(2) 1231 (as supplementing prior articles in LE) reflects that the doctrine of bagueness as set out above is still viable.

(In Texas the Legislature - prior to 1951 - had enacted a rigid speed law. The so called prima facie reasonable and prudent speed law came into effect in 1951 and made its first appearance before the CCrA in ROWLAND v STATE 311 SW[2] 831 in 1957. Texas had only a three judge court at the time. One judge said the act was constitutional. One judge said it wasn't. And one judge said there was no need to decide the Constitutional Question. Later in EAVES v STATE 353 SW[2] 231, the judge who said the question didn't need answering, switched to vote for constitutionality - NOT BECAUSE OF THE ARGUMENTS FOR SAME - but becasue thrity other states had similar laws.)

No Texas Court has ever really made any kind of in depth study or decision on the question of the constitutionality of the Texas speeding law where the attack has been for vagueness.

Nor has this Court ever had the question as posed herein.

For the Travis County Attorney to say that the cases cited are only applicable to First Amendment rights is not only misleading but clearly without any relevancy whatsoever.

III (PRESUMPTION)

Where a person goes faster than the prima facie speed as SITTON might be considered to have been doing in this case; the State - as it did here - relied on the excessive prima facie speed to prove the essential element of unreasonableness.

> *(If the State says that it relied on the opinion of the officer, then it cleraly runs afoul of the vagueness doctrine set out above, see II, supra, for then, clearly, the criminality-content of the speeding law is furnished by the opinion of a third party. Once a statute is so read, it fails under the vagueness doctrine for the alleged offender isn't able to give the same criminality-content to the statute as the policeman does; and contrarywise the policeman can give criminality-content to the action of the alleged offender who gives legal content to what he is doing. In short, one man's reason is another man's irrationality; this is probably the rationale behind this Court's description of the "standard" of "reasonable" as being "amorphous" PEYTON v NY ____US ___: 63 LE[2] 639; 100 SC ___.)*

The Travis County Attorney cites THOMAS v STATE 474 SW(2) 692 for the proposition that "prima facie" evidence must be defined to the jury. This is so, BUT IT IS ALSO OMMISSIVE OF THE PERTINENT HOLDING OF THE CASE. THOMAS really, and relevantly here, stands for the proposition that the word "prima facie' means that a person is "presumed" to have been acting "unreasonably" unless he produce evidence to the contrary.

THOMAS, in short, makes the presumption that travelling over the prima facie speed limit is unreasonable and imprudent, a burden-shifting presumption squarely contrary to ULSTER COUNTY COURT v ALLEN 442 US 140; 60 LE(2) 777; 99 SC 2213 (as follows):

> *Presumptions and inferences are a staple of our adversary system; there are times when it is "necessary" that one arrive at one fact flwoing from a proven or "basic" fact; BUT THE CONSTITUTIONAL VALIDITY OF SUCH EVIDENTIARY DEVICES DEPENDS ON THE STRENGTH OF THE CONNECTION BETWEEN THE PROVEN FACT AND THE PRESUMED FACT: AND IN A CRIMINAL CASE SUCH AN EVIDENCTIARY DEVICE CANNOT*
>
> > *"undermine the factfinder's responsibility at trial... to find the ultimate facts beyond a reasonable doubt."*
> >
> > *The most common device is the permissive presumption which permits - but doesn't require - the factfinder to infer a fact from a proven fact; BUT DOESN'T REQUIRE THE DEFENDANT TO DO ANYTHING, i.e. it doesn't place any burden on the defendant.*
> >
> > > *Under this device the test is whether there is a relationship between the proven fact and the inferred fact sufficient to permit the inference*

Mandatory presumptions tell "... the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts. "

Cf. THOMAS, supra, which interpretes Art. 670ld, Sec. 166(a) TCS to be a presumption which may be followed unless evidence is produced by the Defendant to rebut it.

There is a distinction

"... between a permissive presumption on which the prosecution is entitled to rely as one not-necessarily-sufficient part of its proof and a mandatory presumption which the jury must accept even if it is the sole evidence of the offense.

In the latter situation, since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt."

Permissibe presumptions may apply to a not-necessarily-sufficient part of the prosecution's case and the only Constitutional test is that there be some rational relationship between the proven fact and the inferred fact. (i.e the LEARY v US 395 US 6; 23 LE[2] 57; 89 SC 1532 test).

"As long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the test described in Leary."

So spoke this Court in ULSTER COUNTY COURT, which it echoed in SANDSTROM v MONTANA 442 US 510; 61 LE(2) 39; 99 SC 2450 and SANDSTROM clearly damns burden-shifting presumptions such as the one used in the case at bar.

(Here the facts reflect clearly that apart from the criminality-content given the situation by the police-person, the conviction of guilt rested solely on the presumption arising from the statute, for apart from such a presumption, there was no evidence of unreasonableness on the part of SITTON. In short "the sole and sufficient basis for the finding of guilt" in this case is the presumption. If it is the police-person's testimony that in her opinion SITTON was unreasonable, then she and she alone gave criminaltiy-content to his action, for he said he was acting reasonably.)

HERE THE FACT PROVEN was that SITTON was going more than 30 mph which the prima facie speed limit . Question?

CAN ONE SAY FROM THIS FACT ALONE THAT SITOON WAS ACTING IN AN UNREASONABLE AND/OR IMPRUDENT MANNER? Particularly where there were no hazzards shown to have existed at the time - BEYOND A REASONABLE DOUBT?

OR

Does the inference of unreasonableness and/or imprudence flow from the proof of over prima facie limit speed BEYOND A REASONABLE DOUBT?

The answer is so obvious as to make the question(s) rhetorical.

IV (SUBSTANTIVE DUE PROCESS)

As in much of the other parts of her answer, the Travis County Attorney simply says "it isn't so" and offers no aythority other than her own (which is the weakest form of argumentation).

People, by Texas law have a natural right to the use of the streets. To say that the State of Soverign cannot control the use of the streets would be contrary to law and good sense, and SITTON does not now, nor before, say that. He does say however, that the Soverign has no power (or can't use it if it be had) to control the use of the streets as it has done here.

Substantive Due Process questions the power of the Soverign to go into various areas; Procedural Due Process questions whether the Soverign does this so as to protect rights afforded. Somewhere between the two rests the question of whether the Soverign has reasonably intruded into the area it seeks to govern. In short the reasonableness of the intrusion as compared to the reasoanbleness of the manner of the intrusion is deemed part of substantive due process.

Take for example this case. That the Soverign can control velocities of motor vehicles on streets is not denied; but they must do so by standards which are reasonable; and they must do so, so that a person intruded upon has a way of testing the intrusions. The middle point is what is being attacked here, and it is inserted into the category of substantive due process for it would seem (reasonably) that no Soverign intrusion can be sustained unless it be a rational intrusion; i.e. unless the actions sought to be governed relate rationally to the evil sought to be abated, and unless such rational relationship be made apparent in the Soverign's act of intrusion (Standards).

(This is not the same question as whether or not the intruded-on person's rights are protected.)

Here Texas seeks to curtail speed on public roads for public safety. If for example Texas said YOU CAN'T SPEED; clearly Texas has gone into matters it has no right to control, for speeding per se isn't sufficient for the Soverign to intervene. Suppose Texas says YOU CAN'T SPEED ON PUBLIC STREETS, then clearly Texas can legislate in such an area for safety sake, not only as to the driver but also as to others (citizenry). But if Texas were to say YOU CAN'T SPEED

ON PUBLIC STREETS, and only say that, it would set a standard which in itself rationally reflects the relationship between speeding and the public welfare.

> *(Some acts are so vicious in and of themselves as to obviate the necessity of making such rational relationship appear, ex.g. murder. But some acts, particularly those which are susceptible to legislation without a mens rea, need to have the rationality of their relationship spelled out otherwise the appearance of justice fails and people will have no respect for a law otherwise valid and useful to the public welfare. Ex.g. speeding: today with the 55 mph law of 23 USC 154, Texas passed Art. 6701d, Sec. 169B TCS which makes it abundantly clear that the only time Texas may set a 55 mph prima facie limit is for the purpose of getting Federal Money. This hardly appears to be a rational relationship to the curtailment of speed especially when the rational relationship between the curtailment of speed and public welfare was set at 70 mph just six years ago, i.e. prior to the passage of 23 USC 154.)*

Since the advent of democracy as a world wide exemplar of a large government, it would seem proper to say tha the word"Soverign" underwent a new definition. Whereas it was once said that a Soverign could do no wrogn, and later it was said that a Soverign was unaccountable to the people except in certain areas; now it could be said that Soverigns <u>have no power</u> in certain areas for the tribe of persons (democracy) gave the Soverign no power in those areas. Thus, it is submitted is the true picture that sets the groundwork for substantive due process. A Soverign has no power to legislate in certain areas, viz, GRISWOLD v CONNECTICUTT 381 US 479; 14 LE(2) 510; 85 SC 1678. Likewise a Soverign must show - unless the same is abudnantly (intensly) apparent - the relationship between its action and the evil sought to be remedied.

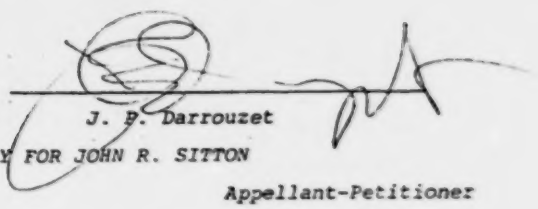
> *(This is really what TOE v WADE 410 US 113; 35 LE[2] 147; 93 SC 705 and its off-shoots are saying. The Soverign has no right to legislate in the area of the "liberty" of abortion unless there be a rational relationship between the act legislated aaginst and the evil sought to be remedied, and further such rational relationship must, via the standards used, be made to appear. In Re MURCHINSON 349 US 133' 99 LE 942; 75 SC 623 cites with approval OFFUT v US 348 US 11; 99 LE 11; 75 SC 11 where it was said "Therefore, justice must satisfy the appearance of justice. Cf. WALL v AMERICAN OPTOMETRIC ASSN. 379 FS 175, affd. 419 US 888.)*

The Travis County Attorney has not answered this argument except to say "it isn't so" and "is clearly without merit" citing no authority except her own to sustain her answer.

PRAYER

SITTON respectfully renews the prayer of his Statement and/or Petition heretofore filed herein.

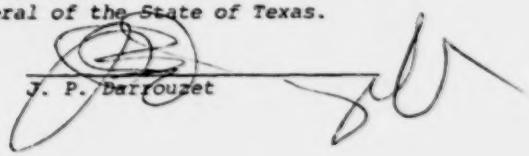
RESPECTFULLY SUBMITTED



J. P. Darrouzet
ATTORNEY FOR JOHN R. SITTON
Appellant-Petitioner

CERRIFICATE OF SERVICE

The undersigned attorney ehreby certifies that a a copy of the above has been forwarded to the County Attorney of Travis County, Texas and the Attorney General of the State of Texas.



J. P. Darrouzet

DWAYNE EDWARD HOWARD, Appellant
No. 56,991. v.
The State of Texas, Appellee

Appeal from Travis County
Attorney: Hugh Lowe

O P I N I O N

This is an appeal from a conviction for possession of less than two ounces of marihuana. Punishment was assessed at a $100 fine and 5 days in jail, and appellant was placed on probation for 12 months.

On the evening of Feb. 5, 1977, appellant and two female companions were in an area behind the Everett Hardware Store in Austin at 9:40 p.m., lying in leaves, when they were approached by a city police officer investigating noises he heard from that area. The officer asked the group what they were doing there and one of the girls answered, "Nothing." They were all ordered against the wall of the building so they could be frisked. Appellant was then asked what he was doing there, and he said he was drinking beer. When asked if he had ever been arrested before, he said hes he had, for burglary. All three were then placed under arrest for loitering under Austin City Ordinance 23-9. After they were arrested and placed in the police car, a baggie of marihuana was taken from appellant's right sock.

In his first ground of error appellant challenges the denial of his motion to suppress, contending the contraband was recovered as a result of an unlawful arrest under an unconstitutional municipal ordinance.[1] The ordinance under challenge provides:

"It shall be unlawful for any person within the city to be in the nighttime in or about public or private buildings or premises, where he has no right or permission to be, under suspicious circumstances, and without being able to give a satisfactory account of the same."

This ordinance in substantially the same form was approved over challenges to its constitutionality in Sims v. St., 391 S.W.2d 63[illegible] In that opinion, however, we neglected to consider the vagueness of the element of this offense of "without being able to give a satisfactory account of the same." This standard, we find, is patently unconstitutional on its face, because it is "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application...." Baker v. St., 478 S.W.2d 445, 449, quoting Connally v. Genl. Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed.322.

There is no statutory designation of what would constitute a "satisfactory account." In practice, such a standard delegates unguided and unrestrained discretion to the arresting officer to decide what answers given by a potential arrestee are "satisfactory account[s]" and which are not. The result is that the ordinance not only "[l]ack[s] intelligible standards to guide those charged with its enforcement" (Baker, supra), but in fact affirmatively assigns to the arresting officer the legislative responsibility to give content and meaning to the ordinance by defining one of its elements with the "fill in the blank" standard that makes the scope of offending conduct a product of the officer's subjective determination of whether he finds the detainee's account of the circumstances in which he is found, to be, in the officer's judgment, satisfactory."

Having found the ordinance under which appellant was arrested to be patently unconstitutional on its face, we must determine whether the contraband seized pursuant to that arrest should have been suppressed by the trial court.

In the recent decision in Mich. v. DeFillippo, 25 Cr.L. 3211, the Court announced a rule permitting the introduction of evidence seized pursuant to an arrest under a law then in force, even though it is subsequently declared unconstitutional. The Court, however, did recognize "the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." What law could be more grossly and flagrantly unconstitutional than one that leaves to the arresting officer the task of giving content to one element of the offense, and of deciding the scope of the ordinance's prohibition, according to his own judgment of what constitutes a "satisfactory account" by the potential defendant? We hold the ordinance under which appellant was arrested exhibits a vagueness obvious to "any person of reasonable prudence," and the evidence should have been suppressed.

Alternatively, we note that in Baker, supra, a knife seized incident to an arrest under an unconstitutional vagrancy statute was ordered suppressed in a prosecution for unlawfully carrying a switchblade knife. We reaffirm the soundness of the Baker rule as a matter of state law, independently of the standard announced in DeFillippo, supra, and hold that the evidence seized incident to an arrest under an unconstitutional law is excludable under Texas law. See, Art. 1, §19, Tex.Const.; Art. 38.23, C.C.P.

Because the trial court erred in denying appellant's motion to suppress, the ground of error is sustained.

The judgment is reversed and the cause remanded.

(Delivered September 19, 1979) En Banc

Odom, Judge

Onion, P.J., Douglas, J., T. Davis, J., and Dally, J., dissent.

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[1] The ordinance is not susceptible of a narrowing construction by severing the invalid language, as was done in Delorme v. St., 488 S.W.2d 808. "[I]f one element of a single offense is found constitutionally defective, the offense must fall, because to sever the single element would broaden the scope of the statute, prohibit new conduct not prohibited by legislative act, and violate the legislative intent. The courts would be creating a new offense, prohibiting conduct not theretofore an offense." Hixon v. St., 523 S.W.2d 711, 717 (concurring opinion).

RONALD RALPH HERNANDEZ, Appellant

NO. 59,930 v. - - - Appeal from TRAVIS County

THE STATE OF TEXAS, Appellee

O P I N I O N

This is an appeal from a speeding conviction under Article 6701d, Sec. 166, V.A.C.S. The record reflects that the case was originally tried in the Justice of the Peace Court, Precinct No. 4, Travis County. The appellant was found guilty and assessed a fine of $12.50. Appellant appealed to County Court at Law No. I of Travis County. He was found guilty and punishment was assessed at a fine of $101.00.

The appellant was issued a ticket for doing 70 miles per hour in a 55 mile per hour zone. The appellant believed that his speed was between 58 and 60 miles per hour. The State and the appellant stipulated to the fact that the appellant's speedometer was found to be off by 10 miles per hour.

In grounds of error one and two, the appellant contends that the complaint is fatally defective in that it fails to allege a culpable mental state, and that reversible error occurred because the State failed to prove a culpable mental state.

This Court has recently held in Zulauf v. State, ___ S.W.2d ___, No. 62,307 (Tex.Cr.App., delivered December 12, 1979) that speeding is a strict liability offense which does not require that a culpable mental state be alleged. In Zulauf v. State, supra, we said:

> "The clear command of Article 6701d, Sec. 166, supra, that:
>
> '... no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the circumstances then existing...'
>
> provides more than adequate support for our holding herein that the Legislature intended to make speeding a strict liability offense where liability would not be contingent upon the allegation of a culpable mental state."

As no culpable mental state is required to constitute the offense of speeding, the State did not err in failing to allege and prove one. These two grounds of error are overruled.

In grounds of error three and four, the appellant contends that the complaint is fatally defective because it fails to state an offense. The appellant urges that the exact location of the offense is an element which must be alleged, because without such an allegation, appellant is not informed as to why it was unreasonable and imprudent to be traveling at 70 miles per hour.

Article 45.17, Vernon's Ann.C.C.P. provides that a complaint must state:

> (1) The name of the accused, if known, and if unknown, shall describe him as accurately as practicable;
>
> (2) The offense with which he is charged, in plain and intelligible words;
>
> (3) That the offense was committed in the county in which the complaint is made; and
>
> (4) It must show, from the date of the offense stated therein, that the offense is not barred by limitation."

The complaint in this case, omitting the formal parts, states:

> "Ronald Ralph Hernandez, did then and there operate and drive a vehicle, to-wit: pickup upon a public street and highway of Texas, at the unreasonable, imprudent and unlawful speed of 70 miles per hour which was then and there a speed greater than was reasonable and prudent under the conditions then existing, at which time and place the prima facie reasonable and prudent speed limit was 55 miles per hour." (Emphasis added)

A motion to quash was not filed; therefore, only defects which would render the complaint fundamentally defective may now be considered. Scott v. State, 543 S.W.2d 128 (Tex.Cr.App. 1976). The complaint must allege all of the essential elements of the offense to be sufficient. See American Plant Food v. State, 508 S.W.2d 598 (Tex.Cr.App. 1974). We find that the

offense with which the appellant is charged is set forth in the complaint in plain and intelligible words, as required by the statute. The complaint is not fundamentally defective because it does not explain how the 55 mile per hour limit was established. These grounds of error are overruled.

Appellant in his final ground of error, contends that the trial court erred in finding him guilty since the State admitted that the appellant was operating under a mistake of fact, thereby making V.T.C.A. Penal Code, Sec. 8.02 applicable.

Section 8.02(a), supra, states:

> "It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for the commission of the offense."

Mistake of fact constitutes a defense only if it negates the culpable mental state. As the offense of speeding does not require the proof of a culpable mental state, Sec. 8.02, supra, is not applicable. See Zulauf v. State, supra. This ground of error is overruled.

The judgment is affirmed.

PER CURIAM

(Delivered January 16, 1980)

By: Panel 3; 1st Quarter, 1979

Carl E. F. Dally, Judge
W. C. Davis, Judge
Sam Houston Clinton, Judge